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Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–376 OF 2005

B GOPAL SRI RAM, LOW HOP BING AND ABDULL HAMID EMBONG JJCA

8 NOVEMBER 2006

C *Civil Procedure — Injunction — Injunction to restrain party from presenting a winding up petition against company — Family enterprise — Disputes between family members — Admission to debt owed — Whether learned judge took into account irrelevant considerations*

D *Companies and Corporations — Winding up — Petition under s 218 — Family enterprise — Dispute between family members — Undisputed that the defendant had advanced amounts in excess of RM1m to the company — Whether normal case of creditor demanding debt due*

E

The respondent is a private limited company, a family enterprise run by three brothers and a nephew. At all material times, the appellant was the managing director of the plaintiff company. In 2003, a dispute arose between the brothers and the nephew. The consequence of that dispute was the removal of the defendant as
F managing director. The defendant was unhappy. He took out a petition under s 181 of the Companies Act 1965 ('the Act'), alleging oppression and that petition was currently pending before the High Court. It was undisputed that the defendant had advanced amounts in excess of RM1m to the plaintiff. The defendant made a demand for the amount owing to him and later instructed his solicitors to send a
G formal demand under s 218 of the Act dated 27 August 2004. On 20 September 2004, the plaintiff company issued a writ seeking a declaration that the demand was premature and not in accordance with law. There was also a claim for a consequential order to restrain the defendant from presenting a winding up petition against the plaintiff. On the same date, the plaintiff moved by ex parte and obtained an interim injunction to restrain the presentation of the winding up. The plaintiff took out an
H inter partes summons in the same terms as the earlier ex parte application. The learned High Court judge granted the inter partes interim injunction against the defendant from presenting a winding up petition. The judge also refused to dissolve the earlier ex parte order which he had granted in like terms as the inter partes injunction. The appellant appealed against both these orders.

I

Held, dismissing the appeal:

(1) This was not a normal case of a creditor demanding a debt due to him in the ordinary course of business. It was alleged by the plaintiff that although there

was no dispute about the sum owing to the defendant, the terms of repayment were agreed between the brothers and the nephew collaterally. In short, this was not a debt due on demand. There was also the circumstance before the judge of the presentation of the petition under s 181 of the Act. The court hearing that petition had wide jurisdiction under sub-s 2 of that section to make orders adjusting the rights of the parties. Having given this matter the utmost consideration and having anxiously scrutinised the record we are satisfied that the learned judge was entirely correct in granting the inter partes injunction (see para 11).

(2) Hence the defendant's complaint about the ex parte order. The court agreed with the approach of the learned judge that once the plaintiff's application for an inter partes injunction succeeded, the defendant's application to set aside the ex parte injunction was doomed to fail (see para 13).

[Bahasa Malaysia summary

Responden adalah sebuah syarikat sendirian berhad, satu perusahaan keluarga yang dikendalikan oleh tiga orang adik beradik dan seorang anak saudara. Pada kesemua masa yang material, perayu adalah pengarah urusan syarikat plaintif. Pada 2003, satu pertikaian berbangkit timbul di antara adik beradik dan anak saudara tersebut. Akibat daripada pertikaian tersebut timbul penyingkiran defendan sebagai pengarah urusan. Defendan tidak berpuas hati. Beliau mempetisyen di bawah s 181 Akta Syarikat 1965 ('Akta tersebut') menyatakan penindasan dan petisyen tersebut pada masa kini belum lagi didengar di Mahkamah Tinggi. Ia tidak dipertikaikan bahawa defendan telah memberikan amaun melebihi RM1j kepada plaintif. Defendan telah membuat tuntutan amaun yang dihutang kepadanya dan kemudian telah mengarahkan peguamcaranya untuk menghantar satu tuntutan formal di bawah s 218 Akta tersebut bertarikh 27 Ogos 2004. Pada 20 September 2004, syarikat plaintif mengeluarkan satu writ memohon satu deklarasi bahawa tuntutan tersebut adalah pra masa dan tidak mengikut undang-undang. Terdapat juga satu permohonan untuk perintah selanjutnya untuk menghalang defendan daripada mengemukakan satu petisyen penggulungan terhadap plaintif. Pada tarikh yang sama, plaintif melalui permohonan ex partenya telah memperolehi satu injunksi interim menghalang defendan daripada mengemukakan satu petisyen penggulungan. Plaintif memfailkan satu saman inter partes berdasarkan terma-terma yang sama dengan permohonan ex parte yang terdahulu tersebut. Hakim Mahkamah Tinggi yang bijaksana memberikan injunksi interim inter partes terhadap defendan daripada mengemukakan satu petisyen penggulungan. Hakim tersebut juga enggan membubarkan perintah ex parte yang terdahulu yang diberikannya atas terma-terma yang serupa dengan injunksi inter partes tersebut. Perayu merayu terhadap kedua-dua perintah tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Ini bukannya satu kes biasa dimana seseorang pemiutang menuntut jumlah yang terhutang kepadanya dalam urusan perniagaan biasa. Ia dikatakan oleh plaintif bahawa walaupun tiada pertikaian akan jumlah yang dihutang kepada

defendan, terma-terma pembayaran balik telah dipersetujui di antara adik beradik dan anak saudara secara kolateral. Pendek kata, ini bukannya satu hutang yang kena dibayar sebaik sahaja dituntut. Terdapat juga satu petisyen sebelum hakim yang dikemukakan di bawah s 181 Akta tersebut. Mahkamah yang mendengar petisyen tersebut mempunyai bidangkuasa yang luas di bawah sub-s 2 seksyen tersebut untuk membuat perintah-perintah menyelaraskan hak-hak pihak-pihak. Setelah memberi perkara ini pertimbangan yang tertinggi dan setelah meneliti rekod, kami berpuashati bahawa hakim yang bijaksana adalah betul sama sekali dalam memberikan injunksi inter partes tersebut (lihat perenggan 11).

(2) Ini membawa kepada aduan defendan terhadap perintah ex parte tersebut. Mahkamah bersetuju dengan pendekatan hakim yang bijaksana bahawa sebaik sahaja permohonan untuk satu injunksi inter partes berjaya, permohonan defendan untuk mengenepikan injunksi ex parte akan gagal (lihat perenggan 13).]

Notes

For cases on injunction to restrain party from presenting a winding up petition against company, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2723–2724.

For cases on petition under s 218, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1246.

Cases referred to

American Cynamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 AII ER 504 (refd)

Bellador Silk, Ltd, Re; [1965] 1 AII ER 667 (refd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 (refd)

Goldsmith v Sperrings [1977] 1 WLR 478 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 (refd)

Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311 (refd)

Natseven TV Sdn Bhd v Television New Zealand Ltd [2001] 4 CLJ 722 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218
Rules of the High Court 1980 O 29 r 1(2A)

Lim Chee Wee (Lee Shih with him) (Skrine) for the appellant.
David Hoh (Lim & Hoh) for the respondent.

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] There are two appeals before us. The first, Civil Appeal No W–02–376–2005, is directed against the order of the High Court granting an inter partes interim injunction dated 16 March 2005 against the defendant (the appellant before us) from presenting a winding up petition against the plaintiff (who is the respondent before us). The second appeal, Civil Appeal No W–02–377–2005, is directed against the refusal of the learned judge of the High Court to dissolve the earlier ex parte order dated 23 September 2004 which he had granted in like terms as the inter partes injunction which is the subject matter of the first appeal. We find it convenient to deal with the first appeal *in toto*. We will however, make the necessary remarks about the second appeal at the appropriate places in the judgment.

[3] The plaintiff is a private limited company. It is basically a family enterprise run by three brothers and a nephew. At all material times, the defendant was the managing director of the plaintiff company. Later he was removed as managing director but he remained at all times and continues to remain as a director. The company is a going concern. It has the benefit of the distributorship of cigarettes in the city of Klang. In 2003, a dispute arose between the brothers and the nephew. The consequence of that dispute was, as we have just said, the removal of the defendant as managing director. The defendant was unhappy: perhaps justly so because he had run the company for sometime with a measure of success. He took out a petition under s 181 of the Companies Act 1965, alleging oppression. That petition is currently pending the hearing of the summons for directions before the High Court.

[4] It is undisputed that the defendant had advanced amounts in excess of RM1m to the plaintiff. This fact is confirmed by the plaintiff's accounts, Note 6 of which makes reference to the sum outstanding owing to the defendant and the other directors. By a letter dated 6 August 2004, the defendant made a demand for the amount owing to him. He received no response. So he instructed his solicitors to send a formal demand under s 218 of the Companies Act 1965. That demand is dated 27 August 2004. On 20 September 2004, the plaintiff company caused to be issued a writ seeking a declaration that the demand was premature and not in accordance with law. There was also a claim for a consequential order to restrain the defendant from presenting a winding up petition against the plaintiff. On the same date, the plaintiff moved by ex parte and obtained an interim injunction to restrain the presentation of the winding up. For some reason, not made entirely clear to us in argument before us, the order granted required the defendant to pay the costs of that application. We will deal with this part of the case later in this judgment. Suffice to say for now that this is a most unusual order. In a normal case, costs of an ex parte application usually are in the cause or follow the event of the inter partes application. Returning to the mainstream, the plaintiff took out an inter partes summons in the same terms as the earlier ex parte application. That was heard and granted by the learned judge who also dismissed the defendant's application to discharge the ex parte order. As we have already said, the defendant has appealed against both these orders.

[5] The main thrust of the defendant's case before us is that the learned judge misdirected himself on the correct test that is to be applied to a case as the present.

Mr Lim Chee Wee, counsel for the appellant, argued that the learned judge was wrong in at least three instances. First, he paid little or no regard to the clear admission of the debt in question by the plaintiff in its accounts. Second, he misdirected himself in law by applying a low threshold in granting the injunction sought. Thirdly, the learned judge took into account irrelevant considerations. Before we express our concluded views on the complaints made by the defendant, we think we should say a few words about the nature of the injunction in this case.

[6] Every court has inherent jurisdiction to prevent an abuse of its process. It is a jurisdiction that is essential to ensure that the court's process is not used for a collateral purpose; that is to say for a purpose other than to obtain redress for a genuine grievance. This court has recognized that jurisdiction on more than one occasion. In *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425, this court observed as follows:

> Every person who is aggrieved by some wrong he considers done to him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings* [1977] 1 WLR 478, where at p 489 he said:
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> In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law.
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> The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
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> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

[7] When a court exercises its discretion to issue an injunction to restrain the presentation of a winding up, it exercises its inherent jurisdiction. It does so in order to prevent an abuse of its process. In *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83, McGarvie J put the point as follows:

> When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. *Mann v Goldsteing* [1968] 1 WLR 1091, at pp 1093-4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. The law has long recognized that

with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognized that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.

The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

[8] When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds (see *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 does not apply. In *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, Low Hop Bing J (as he then was) correctly held as follows (at p 321):

In *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:

I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case and that the principle relating to the test of 'serious question to be tried' in *American Cynamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.

Illustration of a prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.

[9] Mr Lim Chee Wee of counsel has submitted that the judgments on the correct test to be applied as handed down by the different divisions of the High Court in this country are at variance; that they do not speak with one voice. With respect, we are unable to agree. The general principle, unchanging in substance, is this. A court will grant an interlocutory injunction whenever it is just and equitable to do so. Whether it is just and equitable to issue an injunction in a given fact pattern must

vary from case to case. Accordingly, it is not practical just to apply a uniform or standard measure for a wide ranging set of circumstances. That is because equitable relief is flexible and to apply a standard formula would be to deprive or erode the wide discretion which a court has in deciding whether or not to grant interim equitable relief. In the application of this general principle to the kind of injunction sought in the present instance, the test is whether the debt claimed is bona fide disputed on substantial grounds.

[10] With that, we now turn to consider the defendant's complaints in this appeal. We are unable to agree with Mr Lim Chee Wee that the learned judge has erred in the exercise of his discretion. This is not a normal case of a creditor demanding a debt due to him in the ordinary course of business. There is a story lying behind the debt. It is alleged by the plaintiff that although there is no dispute about the sum owing to the defendant, the terms of repayment were agreed between the brothers and the nephew collaterally. In short, this was not a debt due on demand. There is also the circumstance before the judge of the presentation of the petition under s 181. The court hearing that petition has wide jurisdiction under sub-s 2 of that section to make orders adjusting the rights of the parties. With his customary frankness, Mr Lim Chee Wee conceded that the court hearing the petition under s 181 would have power to deal with the debt which now forms the subject matter of the present suit. The totality of the circumstances accordingly reasonably support a prima facie inference that the statutory demand and the threat to present a winding up petition were made for a collateral purpose, namely to bring pressure on the plaintiff company. A court is well entitled to restrain such a petition and if a petition is in fact presented the court has power to dismiss it on that ground (see *Re Bellador Silk, Ltd* [1965] 1 All ER 667).

[11] Having given this matter our utmost consideration and having anxiously scrutinised the record we are satisfied that the learned judge was entirely correct in granting the inter partes injunction.

[12] That brings us to the defendant's complaint about the ex parte order. We are in agreement with the approach of the learned judge that once the plaintiff's application for an inter partes injunction succeeded, the defendant's application to set aside the ex parte injunction was doomed to failure. We are unable to accept Mr Lim Chee Wee's complaint that the ex parte order was obtained in breach of O 29 r 1(2A) of the Rules of the High Court 1980. Learned counsel's argument is that the plaintiff did not disclose points in favour of the defendant when making the ex parte application, in particular the admission in Note 6 of the plaintiff's accounts. But we do not think there is anything in the point because the debt was in fact bona fide disputed on substantial grounds; not as to its amount, but as to the terms of its repayment. But we do agree with Mr Lim Chee Wee that the order for costs ought not to have been made in the way it was. The matter is academic because having failed in its application to set aside the ex parte order, the defendant has to pay the costs occasioned by its failure. Perhaps the proper order would be to relieve the defendant from paying the costs of the ex parte order. We would therefore set aside so much of that order.

[13] Save to the very limited extent to which we have indicated, we are unanimous that these appeals are without merit and we dismiss them. The appellant shall pay the costs of these appeals to the respondent. The deposits shall be paid to the respondents to account of their taxed costs. For completeness, we affirm the inter partes injunction granted by the learned judge.

Appeal dismissed.

Reported by Sally Kee